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OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

OFFICE OF FEDERAL  
PROCUREMENT POLICY

FEB 26 1979

OFFICE OF MANAGEMENT AND BUDGET  
OFFICE OF FEDERAL PROCUREMENT POLICY

UNIFORM RULES OF PROCEDURE FOR BOARDS OF CONTRACT APPEALS  
AND RELATED REGULATIONS

Interim Final Rules

AGENCY: Office of Federal Procurement Policy (OFPP), Office of Management and Budget.

ACTION: Notice of Interim Final Uniform Rules of Procedure for Boards of Contract Appeals and related regulations.

SUMMARY: On November 1, 1978, the President signed into law Public Law 95-563, the "Contract Disputes Act of 1978." That Act, among other things, requires changes to the Rules of Procedure currently in use by the Boards of Contract Appeals of the procuring agencies, as well as certain other changes in contract clauses and procurement regulations by March 1, 1979. Proposed Rules of Procedure and related regulations were published for comment in the January 25, 1979, Federal Register. The Interim final Rules and regulations set forth below incorporate the changes required by Public Law 95-563, and reflect many of the comments received on the proposed Rules and regulations. Some of the changes to the Rules and regulations made as a result of comments received are significant. These Rules and regulations are therefore issued as implementation of Public Law 95-563, effective on March 1, 1979, on an interim basis, and will automatically become final on June 1, 1979 unless changed before that time. This will enable the Office of Federal Procurement Policy to evaluate additional comments on the Interim Rules and regulations. The Rules of Procedure are to be adopted uniformly by all Boards of Contract Appeals.

DATE: These Interim Rules and regulations are effective on March 1, 1979.

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EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
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PROCUREMENT POLICY

## RULES OF PROCEDURE FOR BOARDS OF CONTRACT APPEALS

### **PREFACE TO RULES**

#### **I. Jurisdiction for considering appeals**

The \_\_\_\_\_ Board of Contract Appeals (referred to herein as the "Board") shall consider and determine appeals from decisions of contracting officers pursuant to the Contract Disputes Act of 1979 (Public Law 95-563, 41 U.S.C. 601-613) relating to contracts made by (i) the \_\_\_\_\_ (executive agency) or (ii) any other executive agency when such agency or the Administrator for Federal Procurement Policy has designated the Board to decide the appeal.

#### **II. Organization and location of the Board**

(a) The Board's address is ( ), telephone ( ).

(b) The Board consists of a Chair, Vice Chair, and other members, all of whom are attorneys at law duly licensed by any state, commonwealth, territory, or the District of Columbia. In general, the appeals are assigned to a panel of at least ( ) members who decide the case by a majority vote. Board Members are designated Administrative Judges.

#### **III. Time, Computation, and Extensions**

(a) Where possible, procedural actions should be taken in less time than the maximum time allowed. Where appropriate and justified, however,

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extensions of time will be granted. All requests for extensions of time  
shall be in writing.

(b) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.

#### IV. ExParte Communications

No member of the Board or of the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal, submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This provision does not apply to consultation among Board members nor to ex parte communications concerning the Board's administrative functions or procedures.

### RULES

#### Preliminary Procedures

##### 1. Appeals, How Taken

(a) Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken.

(b) Where the contractor has submitted a claim of \$50,000 or less to the contracting officer and has requested a written decision within 60 days

from receipt of the request, and the contracting officer has not done so, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(c) Where the contractor has submitted a claim in excess of \$50,000 to the contracting officer and the contracting officer has failed to issue a decision within a reasonable time, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure to issue a decision.

(d) Upon docketing of appeals filed pursuant to (b) or (c) hereof, the Board may, at its option, stay further proceedings pending issuance of a final decision by the contracting officer within such period of time as is determined by the Board.

2. Notice of Appeal, Contents of

A notice of appeal should indicate that an appeal is being taken and should identify the contract (by number), the department and agency or bureau involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if known. The notice of appeal should be signed by the appellant (the contractor making the appeal), or by the appellant's duly authorized representative or attorney. The complaint referred to in Rule 6 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

3. Docketing of Appeals

When a notice of appeal in any form has been received by the Board, it shall be docketed promptly. Notice in writing shall be given to the appellant with a copy of these rules, and to the contracting officer.

4. Preparation, Content, Organization, Forwarding, and Status of Appeal File

(a) Within 30 days of receipt of an appeal, or notice that an appeal has been filed, the contracting officer shall assemble and transmit to the Board: (1) the decision from which the appeal is taken; and (2) the contract including specifications and pertinent amendments, plans and drawings.

(b) These documents are considered, without further action by the parties, as part of the record upon which the Board will render its decision. However, a party may object to consideration of a particular document or all documents in advance of hearing or of settling the record in the event there is no hearing on the appeal. If such objection is made, the Board will rule upon admissibility into the record as evidence in accordance with Rules 13 and 20 hereof.

5. Dismissal for Lack of Jurisdiction

Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion shall be afforded to application of either party. However, the Board may defer its decision on the motion pending hearing on both the merits and the motion. The Board shall have the right at any time and on its own initiative to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

6. Pleadings

(a) Appellant - Within 30 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board an original and two copies

of a complaint setting forth simple, concise and direct statements of each of its claims. Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. Upon receipt of the complaint, the Board shall serve a copy of it upon the Government. Should the complaint not be received within 30 days, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to set forth its complaint and the Government shall be so notified.

(b) Government - Within 30 days from receipt of the complaint, or the aforesaid notice from the Board, the Government shall prepare and file with the Board an original and two copies of an answer thereto. The answer shall set forth simple, concise and direct statements of Government's defenses to each claim asserted by appellant, including any affirmative defenses available. Upon receipt of the answer, the Board shall serve a copy upon appellant. Should the answer not be received within 30 days, the Board may, in its discretion, enter a general denial on behalf of the Government, and the appellant shall be so notified.

7. Amendments of Pleadings or Record

The Board upon its own initiative or upon application by a party may order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The Board may, in its discretion, and within the

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proper scope of the appeal, permit either party to amend its pleading upon conditions fair to both parties. When issues within the proper scope of the appeal, but not raised by the pleadings, are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised therein. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided, however, that the objecting party may be granted a continuance if necessary to enable it to meet such evidence.

8. Hearing Election

After filing of the Government's answer or notice from the Board that it has entered a general denial on behalf of the Government, each party shall advise whether it desires a hearing as prescribed in Rules 17 through 25, or whether it elects to submit its case on the record without a hearing, as prescribed in Rule 11.

9. Prehearing Briefs

Based on an examination of the pleadings, and its determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been elected pursuant to Rule 8. If the Board does not require prehearing briefs either party may, in its discretion and upon appropriate and sufficient notice to the other

party, if no prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party as previously arranged.

**10. Prehearing or Presubmission Conference**

(a) Whether the case is to be submitted pursuant to Rule 11, or heard pursuant to Rules 17 through 25, the Board may upon its own initiative, or upon the application of either party, arrange a telephone conference or call upon the parties to appear before an Administrative Judge or examiner of the Board for a conference to consider:

- (1) simplification, clarification, or severing of the issues;
- (2) the possibility of obtaining stipulations, admissions, agreements and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;
- (3) agreements and rulings to facilitate discovery;
- (4) limitation of the number of expert witnesses, or avoidance of similar cumulative evidence;
- (5) the possibility of agreement disposing of any or all of the issues in dispute; and
- (6) such other matters as may aid in the disposition of the appeal.

(b) The Administrative Judge or examiner of the Board shall make such rulings and orders as may be appropriate to achieve settlement by agreement

of the parties or to aid in the disposition of the appeal. The results of pre-trial conferences, including any rulings and orders, shall be reduced to writing by the Administrative Judge or examiner and this writing shall thereafter constitute a part of the record.

11. Submission Without a Hearing

Either party may elect to waive a hearing and to submit its case upon the record before the Board, as settled pursuant to Rule 13. Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submission to be supplemented by oral argument (transcribed if requested), and by briefs arranged in accordance with Rule 23.

12. Optional SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedures  
These procedures are available solely at the election of the appellant.

12.1. Elections to Utilize SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedure

(a) In appeals where the amount in dispute is \$10,000 or less, the appellant may elect to have the appeal processed under a SMALL CLAIMS (EXPEDITED) procedure requiring decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the appellant's election.

The details of this procedure appear in section 12.2 of this Rule.

(b) In appeals where the amount in dispute is \$50,000 or less, the appellant may elect to have the appeal processed under an ACCELERATED procedure

requiring decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the appellant's election. The details of this procedure appear in section 12.3 of this Rule.

(c) The appellant's election of either the **SMALL CLAIMS (EXPEDITED)** procedure or the **ACCELERATED** procedure may be made by written notice within 20 days after receipt of notice of docketing the appeal unless such period is extended by the Board for good cause. The election may not be withdrawn except with permission of the Board and for good cause.

(d) In deciding whether the **SMALL CLAIMS (EXPEDITED)** procedure or the **ACCELERATED** procedure is applicable to a given appeal, the Board shall determine the amount in dispute.

#### **12.2. The SMALL CLAIMS (EXPEDITED) Procedure**

(a) Promptly upon receipt of an appellant's election of the **SMALL CLAIMS (EXPEDITED)** procedure, the assigned Administrative Judge shall take the following actions, if feasible, in an informal meeting or a telephone conference with both parties: (i) identify and simplify the issues; (ii) establish a simplified procedure appropriate to the particular appeal involved; (iii) determine whether the appellant wants a hearing, and if so, fix a time and place therefor; (iv) require the Government to furnish all correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued; and (v) establish an expedited schedule for resolution of the appeal.

(b) Pleadings, discovery and other prehearing activity will be allowed only as consistent with the requirement to conduct the hearing on the date scheduled,

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or if no hearing is scheduled, to close the record on a date that will allow decisions within the 120-day limit. The Board, in its discretion, may impose shortened time periods for any actions prescribed or allowed under these rules, as necessary to enable the Board to decide the appeal within the 120-day limit, allowing whatever time, up to 30 days, that the Board considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(c) Written decision by the Board in cases processed under the SMALL CLAIMS (EXPEDITED) procedure will be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single Administrative Judge. If there has been a hearing, the Administrative Judge presiding at the hearing may, in the Judge's discretion, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the Appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes and to establish the starting date for the period for filing a motion for reconsideration under Rule 29.

(d) A decision against the Government or the contractor shall have no value as precedent, and in the absence of fraud shall be final and conclusive and may not be appealed or set aside.

**12.3. The ACCELERATED Procedure**

(a) Promptly upon receipt of an appellant's election of the ACCELERATED procedure, the assigned Administrative Judge shall take the following actions, if feasible, in an informal meeting or a telephone conference with both parties: (i) identify and simplify the issues; (ii) establish a simplified procedure appropriate to the particular appeal involved; (iii) determine whether either party wants a hearing and if either does, fix a time and place therefor; (iv) require the Government to furnish all correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued; and (v) establish an accelerated schedule for resolution of the appeal.

(b) Pleadings, discovery and other prehearing activity will be allowed only as consistent with the requirement to conduct the hearing on the dates scheduled, or if no hearing is scheduled, to close the record on a date that will allow decision within the 180-day limit. The Board, in its discretion, may impose shortened time periods for any actions prescribed or allowed under these rules, as necessary to enable the Board to decide the appeal within the 180-day limit, allowing whatever time, up to 30 days, that the Board considers necessary for the preparation of the decision after closing the record, and the filing of briefs, if any.

(c) Written decisions by the Board in cases processed under the ACCELERATED procedure will normally be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single Administrative Judge with the concurrence of the Chair or a Vice Chair or other designated

Administrative Judge, or by a majority among these two and an additional designated member in case of disagreement. Alternatively, in cases where the amount in dispute is \$10,000 or less as to which the ACCELERATED procedure has been elected and in which there has been a hearing, the single Administrative Judge presiding at the hearing may, with the concurrence of both parties, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes, and to establish the starting date for the period for filing a motion for reconsideration under Rule 29.

12.4. Motions for Reconsideration in Rule 12 cases

Motions for Reconsideration of cases decided under either the SMALL CLAIMS (EXPEDITED) procedure or the ACCELERATED procedure need not be decided within the original 120-day or 180-day limit, but all such motions shall be processed and decided rapidly so as to fulfill the intent of this Rule.

13. Settling the Record

(a) The record upon which the Board's decision will be rendered consists of the documents furnished under Rules 4 and 12, to the extent admitted in evidence, and the following items, if any: pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings,

hearing exhibits, posthearing briefs, and documents which the Board has specifically designated be made a part of the record. The record will, at all reasonable times, be available for inspection by the parties at the office of the Board.

(b) Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

14. Discovery - Depositions

(a) General Policy and Protective Orders - The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting the secrecy of confidential information or documents.

(b) When Depositions Permitted - After an appeal has been docketed and complaint filed, the parties may mutually agree to, or the Board may, upon application of either party, order the taking of testimony of any person

by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(c) Orders on Depositions - The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, governed by order of the Board.

(d) Use as Evidence - No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received in evidence at such hearing. It will not ordinarily be received in evidence if the deponent is present and can testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.

(e) Expenses - Each party shall bear its own expenses associated with the taking of any deposition.

(f) Subpoenas - Where appropriate, a party may request the issuance of a subpoena under the provisions of Rule 21.

15. Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents

After an appeal has been filed with the Board, a party may serve on the other party: (a) written interrogatories to be answered separately in writing,

signed under oath and answered or objected to within 30 days; (b) a request for the admission of specified facts and/or the authenticity of any documents, to be answered or objected to within 30 days after service; the factual statements and the authenticity of the documents to be deemed admitted upon failure of a party to respond to the request; and (c) a request for the production, inspection and copying of any documents or objects not privileged, which reasonably may lead to the discovery of admissible evidence. Any discovery engaged in under this Rule shall be subject to the provisions of Rule 14(a) with respect to general policy and protective orders.

16. Service of Papers Other than Subpoenas

Papers shall be served personally or by mail, addressed to the party upon whom service is to be made. Copies of complaints, answers and briefs shall be filed directly with the Board. The party filing any other paper with the Board shall send a copy thereof to the opposing party, noting on the paper filed with the Board that a copy has been so furnished. Subpoenas shall be served as provided in Rule 21.

Hearings

17. Where and When Held

Hearings will be held at such places determined by the Board to best serve the interests of the parties and the Board. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, Rule 12 requirements, and other pertinent factors. On request or motion by either party and for good cause, the Board may, in its discretion, adjust the date of a hearing.

18. Notice of Hearings

The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearing shall be promptly acknowledged by the parties.

19. Unexcused Absence of a Party

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.

20. Hearings: Nature; Examination of Witnesses

(a) Nature of Hearings - Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and the Government may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.

(b) Examination of Witnesses - Witnesses before the Board will be examined orally under oath or affirmation, unless the presiding Administrative Judge or examiner shall otherwise order. If the testimony of a witness is not

given under oath, the Board may advise the witness that his statements may be subject to the provisions of Title 18, United States Code, sections 287 and 1001, and any other provision of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof.

21. Subpoenas

General - Upon written request of either party filed with the (clerk, recorder), or on his own initiative, the Administrative Judge to whom a case is assigned or who is otherwise designated by the Chairman may issue a subpoena requiring:

(i) testimony at a deposition - the deposing of a witness in the city or county where he resides or is employed or transacts his business in person, or at another location convenient for him that is specifically determined by the Board;

(ii) testimony at a hearing - the attendance of a witness for the purpose of taking testimony at a hearing; and

(iii) production of books and papers - in addition to (i) or (ii), the production by the witness at the deposition or hearing of books and papers designated in the subpoena.

(b) Voluntary Cooperation - Each party is expected (i) to cooperate and make available witnesses and evidence under its control as requested by the other party, without issuance of a subpoena, and (ii) to secure voluntary attendance of desired third-party witnesses and production of desired third-party books, papers, documents, or tangible things whenever possible.

(c) Requests for Subpoenas -

(1) A request for a subpoena shall normally be filed at least:

- (i) 15 days before a scheduled deposition where the attendance of a witness at a deposition is sought;
- (ii) 30 days before a scheduled hearing where the attendance of a witness at a hearing is sought.

In its discretion the Board may honor requests for subpoenas not made within these time limitations.

(2) A request for a subpoena shall state the reasonable scope and general relevance to the case of the testimony and of any books and papers sought.

(d) Requests to Quash or Modify - Upon written request by the person subpoenaed or by a party, made within 10 days after service but in any event not later than the time specified in the subpoena for compliance, the Board may

- (i) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or (ii) require the person in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed books and papers. Where circumstances require, the Board may act upon such a request at any time after a copy has been served upon the opposing party.

(e) Form; Issuance -

(1) Every subpoena shall state the name of the Board and the title of the appeal, and shall command each person to whom it is directed

to attend and give testimony, and if appropriate, to produce specified books and papers at a time and place therein specified. In issuing a subpoena to a requesting party, the Administrative Judge shall sign the subpoena and may, in his discretion, enter the name of the witness and otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(2) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781-1784.

(f) Service -

(1) The party requesting issuance of a subpoena shall arrange for service.

(2) A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place. A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law.

(3) The party at whose instance a subpoena is issued shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for

striking the testimony of the witness and the evidence the witness has produced.

(g) Contumacy or Refusal to Obey a Subpoena - In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States District Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

22. Copies of Papers

When books, records, papers, or documents have been received in evidence, a true copy thereof or of such part thereof as may be material or relevant may be substituted therefor, during the hearing or at the conclusion thereof.

23. Posthearing Briefs

Posthearing Briefs may be submitted upon such terms as may be agreed upon by the parties and the presiding Administrative Judge or examiner at the conclusion of the hearing.

24. Transcript of Proceedings

Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Waiver of transcript may be especially suitable for hearings under Rule 12.2. Transcripts or copies of the proceedings shall be supplied to the parties at the actual cost of duplication.

**25. Withdrawal of Exhibits**

After a decision has become final the Board may, upon request and after notice to the other party, in its discretion permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

**Representation**

**26. The Appellant**

An individual appellant may appear before the Board in person, a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any state, commonwealth, territory, the District of Columbia, or in a foreign country. An attorney representing an appellant shall file a written notice of appearance with the Board.

**27. The Government**

Government counsel may, in accordance with their authority, represent the interest of the Government before the Board. They shall file notices of appearance with the Board, and notice thereof will be given appellant or appellant's attorney in the form specified by the Board from time to time. Whenever appellant and the Government counsel are in agreement

as to disposition of the controversy, the Board may suspend further processing of the appeal. However, if the Board is advised thereafter by either party that the controversy has not been disposed of by agreement, the case shall be restored to the Board's calendar without loss of position.

Decisions

28. Decisions

Decisions of the Board will be made in writing and authenticated copies of the decision will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions shall be open for public inspection at the offices of the Board in Washington, D.C. Decisions of the Board will be made solely upon the record, as described in Rule 13.

Motion for Reconsideration

29. Motion for Reconsideration

A motion for reconsideration, may be filed by either party. It shall set forth specifically the grounds relied upon to sustain the motion. The motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

Dismissals and Defaults

**30. Dismissal Without Prejudice**

In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

**31. Dismissal or Default for Failure to Prosecute or Defend**

Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be either dismissed or granted, as appropriate. If no cause is shown, the Board may take appropriate action.

**32. Remand from Court**

Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with

the court's order. The Board shall consider the reports and enter special orders governing the handling of the remanded case. To the extent the court's directive and time limitations permit, such orders shall conform to these rules.

Sanctions

33. If any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal.

Effective Date

34. These rules shall apply (1) mandatorily, to all appeals relating to contracts entered into on or after March 1, 1979, and (2) at the contractor's election, to appeals relating to earlier contracts, with respect to claims pending before the contracting officer on March 1, 1979 or initiated thereafter.

## REGULATORY COVERAGE AND CONTRACT CLAUSE

### I. Regulatory Coverage - Disputes Procedure

Section 1-314 of the Defense Acquisition Regulation (DAR) and Section 1-1.318 of the Federal Procurement Regulations (FPR) are amended to provide as follows:

#### 1. Contract Disputes Act of 1978

##### (a) General

The Contract Disputes Act of 1978 (P.L. 95-563, 41 U.S.C. 601-613) establishes procedures and remedies to resolve disputes under Government contracts. It is the Government's policy, consistent with that Act, to try to resolve all disputes by mutual agreement at the Contracting Officer's level, without litigation. In appropriate circumstances, before issuance of a Contracting Officer's decision, informal discussions between the parties, to the extent feasible by individuals who have not participated substantially in the matter in dispute, can aid in the resolution of differences by mutual agreement and should be considered. The Contracting Officer is authorized (within any specific limitations in his warrant) to settle all disputes relating to a contract containing the Disputes clause in (DAR 7-103.12) (FPR 1-7.102-12).

##### (b) Exceptions to Use of Disputes Clause

The Disputes clause is prescribed for use in all contracts covered by this regulation, except contracts with a foreign government or

agency thereof, or with an international organization or subsidiary body thereof, if the head of the agency determines that application of the Contract Disputes Act to the contract would not be in the public interest.

(c) Exceptions to Applicability of Disputes Clause Procedures

Under contracts containing the Disputes clause, the procedures and remedies in the clause and this paragraph do not apply to: (i) any claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine, or (ii) any claim involving fraud.

(d) Public Law 85-804 Requests

Requests for relief under Public Law 85-804 are not considered to be claims within the Contract Disputes Act of 1978 or the Disputes clause, and shall continue to be processed under (DAR Section XVII) (FPR Part I-17). However, certain kinds of relief formerly available within the agency only under Public Law 85-804 and not within the Contracting Officer's authority, such as alleged legal entitlement to rescission or reformation for mutual mistake, are now within the Contracting Officer's authority under the Act and the Disputes clause.

In case of doubt, the contracting officer should obtain legal advice as to authority to settle or decide specific types of claims.

2. Contractor Certification of Claims Over \$50,000

Any contractor claim over \$50,000 (either initially or as amended) must be certified in accordance with paragraph (c) of the Disputes clause before settlement or decision on the claim.

**3. Contracting Officer's decision**

(a) When a claim cannot be satisfied or settled by agreement and a decision on the claim is necessary, the Contracting Officer shall:

- (i) Review the facts pertinent to the claim;
- (ii) Secure assistance from legal and other advisors; and
- (iii) Coordinate with the contract administration office or contracting office, when appropriate.

(b) The Contracting Officer shall furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or any other method that provides evidence of receipt, and include in the decision:

- (i) A paragraph substantially as follows:

This is the final decision of the Contracting Officer. This decision may be appealed to the cognizant Board of Contract Appeals. If you decide to make such an appeal you must mail or otherwise furnish written notice thereof to the Board of Contract Appeals, within ninety days from the date you receive this decision. A copy thereof shall be furnished to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, should reference this decision, and identify the contract by number. In lieu of appealing to the cognizant Board of Contract Appeals you may bring an action

directly in the U.S. Court of Claims, within twelve months of the date you receive this decision.

- (ii) A description of the claim or dispute;
- (iii) A reference to pertinent contract provisions;
- (iv) A statement of the factual areas of agreement or disagreement;
- (v) A statement of the Contracting Officer's decision, with supporting rationale;
- (vi) Notification that the small claims procedure of the cognizant Board shall be applicable at the sole election of the contractor in the event the amount in dispute as a result of the final decision is \$10,000 or less; and
- (vii) Notification that the accelerated procedure of the cognizant Board shall be applicable at the sole election of the contractor in the event the amount in dispute as a result of the final decision is \$50,000 or less.

(c) The Contracting Officer shall issue the decision within the following statutory time limitations:

- (i) For claims not exceeding \$50,000: Sixty days after receipt of the claim.
- (ii) For submitted claims exceeding \$50,000: Sixty days after receipt of claim; provided, however, if a decision is not issued within sixty days the Contracting Officer shall notify the contractor of the time within which he will make the decision. The reasonableness

of this time period will depend on the size and complexity of the claim and the adequacy of the contractor's supporting data and any other relevant factors.

(d) The amount determined payable pursuant to the decision, less any portion already paid, normally should be paid without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

4. Government Claims Against the Contractor

All claims asserted by the Government against a contractor relating to a contract which cannot be settled by agreement shall be the subject of a decision by the Contracting Officer.

5. Payment of Interest on Contractor's Claims

The Government shall pay interest on contractors' claims as prescribed in paragraph (d) of the Disputes clause.

II. Disputes Clause

1. Section 7-103.12 of the Defense Acquisition Regulation and Section 1-7.102-12 of the Federal Procurement Regulation are amended to provide as follows:

The Contracting Officer shall insert the following clause in all contracts unless exempted by the head of the agency under 41 U.S.C 603(c):

Disputes

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601, et. seq.). If a dispute arises relating to the contract, the contractor may submit a claim to the Contracting Officer who shall issue a written decision on the dispute in the manner specified in DAR 1-314 (FPR 1-1.318).

(b) "Claim" means

- (1) a written request submitted to the Contracting Officer;
- (2) for payment of money, adjustment of contract terms, or other relief;
- (3) which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and
- (4) for which a Contracting Officer's decision is demanded.

(c) In the case of disputed requests or amendments to such requests for payment exceeding \$50,000, or with any amendment causing the total request in dispute to exceed \$50,000, the Contractor shall certify, at the time of submission as a claim, as follows:

I certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief; and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(Contractor's Name)

(Title)

- (d) The Government shall pay the contractor interest
  - (1) on the amount found due on claims submitted under this clause;
  - (2) at the rates fixed by the Secretary of the Treasury, under the Renegotiation Act, Public Law 92-41;
  - (3) from the date the Contracting Officer receives the claim, until the Government makes payment.
- (e) The decision of the Contracting Officer shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency unless an appeal or action is timely commenced within the times specified by the Contract Disputes Act of 1978.
- (f) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal or action related to the contract, and comply with any decision of the Contracting Officer.

(END OF CLAUSE)

III. Regulatory Coverage - Section 5 of Public Law 95-563

The Federal Procurement Regulations are amended by adding the following new section 1-1.328:

1-1.328 Fraudulent Claims

- (a) Section 5 of the Contract Disputes Act of 1978 (41 U.S.C. 601, 604) provides that if a contractor is unable to support any part of

its claim under the contract and such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, it shall be liable to the Government for -

- (i) an amount equal to the unsupported part of the claim; and
- (ii) costs to the Government attributable to reviewing that part of the claim.

(b) "Misrepresentation of fact" is defined by the Contract Disputes Act as a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

(c) All instances of suspected fraudulent claims shall be reported, through channels, to the Attorney General.

The Defense Acquisition Regulation is amended by adding the following section 1-111.5:

#### 1-111.5 Fraudulent Claims

(a) Section 5 of the Contract Disputes Act of 1978 (41 U.S.C. 601, 604) provides that if a contractor is unable to support any part of its claim under the contract and such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, it shall be liable to the Government for -

- (1) an amount equal to the unsupported part of the claim, and
- (2) costs to the Government attributable to reviewing that part of the claim.

(b) "Misrepresentation of fact" is defined by the Contract Disputes Act as a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

(c) As indicated in 1-111.1 all instances of suspected fraudulent claims shall be reported in accordance with procedures set forth in Part 6 of this section.